

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
AUG 2 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Access Charge Reform)	CC Docket No. 96-262
)	
)	
Reform of Access Charges Imposed by)	
Competitive Local Exchange Carriers)	

REPLY TO OPPOSITIONS

The Rural Independent Competitive Alliance ("RICA") files this Reply to the Oppositions to its Petition for Reconsideration and/or Clarification ("Petition") of the Seventh Report and Order ("Order") in this proceeding, released April 27, 2001.¹

I RICA'S PROPOSED MODIFICATIONS TO THE RURAL BENCHMARK SHOULD BE ADOPTED

- A. The Rural Benchmark Should Be Available To All Rural CLECs Competing With Price Cap Incumbent LECs.

RICA's Petition explained that many of its Rural CLEC members began competitive operations in the areas of incumbent LECs ("ILECs") subject to price cap regulation which were either non-rural or a subsidiary of a large national holding company, such as GTE.² These areas had historically suffered from a lack of investment in facilities resulting in poor service, unavailability of services such as voice mail and Internet access as well as the absence of a local presence. These factors led many rural residents to seek service from neighboring rural

¹ 66 Fed. Reg. 27892, May 21, 2001.

² Petition at 7-8.

No. of Copies rec'd
List ABCDE

014

telephone companies prior to the 1996 Act, and led a very large percentage to switch their service to the rural CLECs when competition became available.³ These areas have since been purchased by new or existing mid-sized companies in a manner that qualifies them as Rural Telephone Companies. Nevertheless, with 200-300,000 access lines, these ILECs are orders of magnitude larger than any of RICA's Rural CLEC members. Under the CALLS order these entities have interstate access rates substantially lower than any rate of return carrier. The Rural CLECs will be required to transition to these rates, absent reconsideration, but would have been eligible to use the Rural Benchmark if the service areas had not been sold, an event which did not change the CLECs' cost of providing service.

AT&T, Sprint and Worldcom oppose reconsideration of this issue on the grounds that the Rural Benchmark was only intended for areas where the ILEC's rural access charges are low because of study area averaging and that Rural ILECs do not have the ability to subsidize rural access rates.⁴ Iowa Telecommunications Services, Inc. ("ITS"), one of the new companies which purchased GTE exchanges complains that its competitor Rural CLECs should not be allowed to charge at the Rural Benchmark level, unless ITS is allowed to charge the same rates.⁵

AT&T's claim that rural ILECs do not have the ability to subsidize rural access rates

³ See, Public Notice, Application of Iowa Telecommunications Service, Inc. for Order Pursuant to Section 251(h)(2), DA 01-1517, Jun. 25, 2001

⁴ AT&T at 3, Sprint at 8, Worldcom at 3. Sprint, at 7, threatens to include the Rural Benchmark in its appeal of the *Order* should the Commission act favorably on RICA's Petition.

⁵ ITS at 5-10. ITS states it serves only two towns with populations over 10,000.

apparently assumes that all rural carriers are small and serve homogeneous areas.⁶ The Act, however, defines a broad range of qualifications for rural telephone company status. Although rural price cap LECs are smaller than non-rural price cap LECs, almost all of the price cap rural LECs are significantly larger than the typical rate of return regulated ILEC.

The Commission recognized at the time it instituted price caps, that such regulation was not appropriate for the average small carrier because, among other reasons, the “lumpiness” of its investment pattern results in substantial revenue requirement swings from one year to another.⁷ In short, the relevant characteristics of rural price cap carriers are more like those of non-rural price cap carriers than they are like small rate of return carriers. Rural CLECs, therefore, remain at a disadvantage when competing with price cap carriers, because they are scheduled by the *Order* to transition to the access rates specified under the CALLS order. The revenues produced by these rates are not sufficient to support the investment by Rural CLECs required to provide the public benefits which the *Order* recognized. The CALLS rates were negotiated by ILECs thousands of times larger than the Rural CLECs. In turn, these large ILECs received benefits they believed appropriate for them, but which have no relevance to Rural CLECs and Rural CLECs had no opportunity to participate in the negotiations.

RICA would not object to grant of the necessary waivers for ITS to return to rate of return status and participate in the NECA pools. It is not clear, however, whether that is what ITS

⁶ AT&T at 11.

⁷ *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, 6800 (1990). In this case the Commission also concluded that GTE carriers were more like Bell carriers than unlike them. *Id.* at 6818.

wants, or whether it merely wishes to have the Rural CLECs everywhere share its pain for what in hindsight may have been an incorrect decision to operate under price cap regulation. ITS paid a high price for a large property which needs substantial additional investment to provide adequate service and for which interstate access revenues contribute only at the CALLS order level.⁸ This situation is a result of decisions it made with full prior knowledge of the existence of and success of the Rural CLECs operating in the exchanges it acquired and the knowledge that those Rural CLECs' interstate access rates were at approximately the NECA level. Despite this knowledge, ITS closed on its acquisition and did not seek waiver of the price cap rules at the time it obtained the necessary study area waivers.

Even if ITS' plight were not of its own making, its claims that its operation is similar to the Rural CLEC must be considered in context of the relative size and resources involved. It is true that ITS lacks the urban centers of Qwest's Iowa service area, but the ten and fifteen thousand population towns it serves are still many times larger than those served by RICA members, none of which exceed a few thousand. With more than 210,000 access lines, ITS is as much as 100 times the size of many RICA members operating in the state and almost 40 times the size of the average NECA member. This considerable difference provides it with economies of scale that are simply unavailable to Rural CLECs. It is therefore reasonable to suggest that Rural CLECs be allowed to use the Rural Benchmark when competing with such a larger entity.

⁸ Although ITS complains, at 2, that CALLS was made "virtually mandatory upon all price cap carriers, even rural LECs like Iowa Telecom, that were not a party to the CALLS coalition," ITS draws over \$230,000 per month in interstate access support. Universal Service Administrative Company, Projections for the Third Quarter 2001, Appendix HC1, p. 6.

B. IXC's and Their Subscribers Receive Substantial Benefits from the Service Improvements Resulting from Investment by Rural CLECs and Should Bear Some of the Cost.

RICA's Petition pointed to the public benefits resulting from the substantial investment in improved facilities which Rural CLECs have made⁹ AT&T and Sprint ignore the substantial benefits they receive from such improvements and argue that the end user subscriber should bear all of the cost of these improvements.¹⁰ When the obsolete, poorly maintained facilities of the ILEC are replaced with modern facilities which are maintained by a local workforce with ties to the community, it is well known that the amount of long distance calling will increase and the time and expense of maintenance will decrease. The natural result is more revenue for IXCs. It is therefore appropriate that both the local and long distance customers should share in the recovery of the costs which made the improvement possible. AT&T and Sprint would have the local rates recover all of the increased cost, which is simply not feasible or fair. The IXCs benefit financially from the improved facilities, it is appropriate that they should pay a portion of the cost.

If the Commission accepts the AT&T/Sprint argument that no Rural CLEC should have a business plan which assumes more than the access rates of a large, price cap ILEC, there is no question but that there will be no further expansion of competition into rural areas. Indeed it is

⁹ The *Order* adopted the Rural Benchmark because, among other reasons, "such a device is consistent with the Commission's obligations, under section 254(d)(3) of the Act and section 706 of the 1996 Act....Given the role that CLECS appear likely to play in bringing the benefits of new technologies to rural areas, we are reluctant to limit unnecessarily their spread...." *Order* at para. 65.

¹⁰ AT&T at 13, Sprint at 7.

questionable whether all of the existing rural operations can continue. What is certain is that the rural customers of many of the price cap ILECs will remain second and third class citizens in terms of reliability and adequacy of even POTS, to say nothing of access to advanced services.

C. The NECA Carrier Common Line Charge Should Be Included in the Rural Benchmark

Worldcom opposes RICA's position that the Carrier Common Line Charge should be included in the Rural Benchmark on the grounds that it would be "absurd" to allow CLECs to recover loop costs from IXCs and that these costs should be recovered from end users or universal service support.¹¹ It is no more absurd for a rural CLEC to recover a portion of loop costs through access charges than it is for a NECA pool member. The *Order* recognizes that rural CLECs have substantially higher loop costs than the ILECs with which they compete.¹² If a rural ILEC purchased the exchanges in question and rebuilt them, a portion of the loop costs would be recovered from IXCs. It is not rational to have a rule which discourages the more competitive and efficient process of overbuilding by a CLEC in favor of purchasing a lot of "goodwill" which does not benefit subscribers.

II THE COMMISSION SHOULD DEFINE THE BOUNDARIES OF PERMISSIBLE DISCRIMINATION AND THE RELATIONSHIP BETWEEN TARIFFS AND CONTRACTS

RICA's Petition asked for clarification of the relationship between tariff and contract

¹¹ Worldcom at 3-4

¹² "We are persuaded by the CLEC comments indicating that they experience much higher costs, particularly loop costs, when serving a rural area...." *Order* at para.66.

rates. Specifically, the Petition pointed to the statements in the *Order* that IXC's are obligated to pay tariffed rates, "absent an agreement to the contrary" and requested clarification of the Commission's view of the application of Sections 202(a) and 203(c) to situations where one IXC is charged at the tariff rate and another at a different, contract rate.¹³ AT&T states only that there is no need for clarification that CLECs can provide access services to IXC's pursuant to intercarrier agreements subject to Section 211 of the Act.¹⁴ Sprint opposes RICA's request on the sole grounds that questions of discrimination must, it claims, be decided on a case-by-case basis.

RICA does not question the legality of the use of intercarrier agreements between CLECs and IXC's, and has previously noted the obligations of carriers under Section 201(a).¹⁵ The issue, however, is whether a carrier can contract with one IXC at certain rates, terms and conditions, and apply a tariff with different rates, terms and conditions for an offering of the same service to another IXC.

It is true that the Act prohibits only unjust and unreasonable discrimination, granting of unreasonable preferences or imposing undue or unreasonable prejudice and that in each case it must be determined whether the respective customers are similarly situated.¹⁶ Nevertheless, it is

¹³ Petition at 13-14, citing *Order* at paras 28, 42, 57.

¹⁴ AT&T at 13, n. 17.

¹⁵ 47 U.S.C. 201(a). Section 211, cited by AT&T only addresses the obligations of carriers to file their intercarrier contracts with the Commission and has no bearing on the substantive issues raised in the Petition.

¹⁶ 47 U.S.C. 202(a). The Commission has previously noted that Section 202(a) is "normally interpreted as requiring that carrier offerings be generally available to all similarly situated customers." *Local Exchange Carrier Individual Case Basis DS3 Service Offerings*, Memorandum Opinion and Order, 4 FCC Rcd 8634, 8642 (1987). The Commission there found that "simultaneous use of averaged cost rates for some facilities and individual cost rates for

not very difficult to determine when two IXCs are similarly situated when both are access customers of a CLEC. Sprint cites no authority for the proposition that in such circumstances a carrier is at liberty to charge different rates without incurring some liability to the customer charged the higher rates.

But even if more facts are needed to determine reasonableness under Section 202, there is no such leeway in Section 203, rather there is an absolute command that a carrier may not “charge, demand, collect, or receive a greater or less or different compensation ...than the charges specified in the schedule then in effect.”¹⁷ Sprint entirely ignores the Section 203 issue and the fact that the *Order* specifically implies that a CLEC can charge a greater or less or different compensation under contract than is specified in its effective tariff without violating Section 203(c). Because of the obvious contradiction between the Act and the Order, it is important that all carriers understand the Commission’s theory as to why the provisions of the act are inapplicable.

III THE COMMISSION SHOULD ADDRESS AT&T’S ILLEGAL DISCONTINUANCE OF SERVICE

In its Comments in response to the FNPRM in this Proceeding, and in its Emergency Petition, RICA requested the Commission to enforce Sections 203(c) and 214(a) in respect to AT&T’s actions discontinuing service to rural communities without authority. The *Order* declines to address these issues, for which RICA’s Petition seeks reconsideration. AT&T in

other facilities would result in unreasonable discrimination.” *Id.* at 8643.

¹⁷ 47 U.S.C. 203(c).

opposition states only that the Commission need not clarify the obligation of IXC's to purchase CLEC access services because it has already ruled that such obligation only exists where CLEC services are priced within the benchmarks established in the *Order*; that the Section 214 issue was resolved in the *Total Telecommunications v. AT&T* decision; and that the issues are before the Commission on referral from the U.S. District Court.¹⁸

RICA agrees that the issues have been, for the most part, briefed in the referral proceeding, however many parties have suffered damages as a result of AT&T's violations who are not parties to the *Advantel* case. It is not clear, in any event, whether the Commission intends to issue a decision on those pleadings as the time has passed by which the Court stated it would either consider a Commission decision, or proceed to make its own.¹⁹ It should also be noted that the Commission's decision in *Total* found only that AT&T did not violate the Act by disconnecting a single end-user and explicitly did not decide whether AT&T would need Section 214 authorization before discontinuing service to more than one customer.²⁰ Further, the Commission emphasized that its decision was limited to the unique circumstances of that case and did not mean that "an IXC has *carte blanche* to discontinue purchasing a CLEC's access service."²¹

¹⁸ AT&T at 13, n. 17.

¹⁹ *Advantel, LLC v. Sprint Communications Co., L.P.*, 125 F.Supp. 2d 800, 807 (E.D. Va. 2001).

²⁰ *Total Telecommunications Services, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, FCC 01-84, Mar. 13, 2001 at n. 71.

²¹ *Id* at para. 35.

IV CONCLUSION

The Rural Independent Competitive Alliance generally endorses the Commission's CLEC Access *Order* and the Rural Benchmark approach adopted therein. The minor modifications RICA requests on reconsideration are entirely consistent with the Commission's recognition that Rural CLECs have advanced the statutory universal service goals expressed in the Communications Act. The Interexchange Carriers who oppose reconsideration want the Commission to conclude that despite the benefits to the public and th IXCs' customers, the IXCs should not contribute in any way to the substantial service improvements which the Rural CLECs have demonstrated they can provide. If these arguments are accepted, there will be no further expansion of competition by Rural CLECs in rural areas, and some existing operations may be discontinued. The Commission can meet its obligations under the act by rejecting the IXC arguments.

Respectfully submitted,

Rural Independent Competitive Alliance

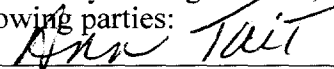

By David Cosson
John Kuykendall

Kraskin, Lesse & Cosson LLP
2120 L St. N.W., Suite 520
Washington, D.C. 20037

202 296 8890

CERTIFICATE OF SERVICE

I, Ann Tait, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Reply to Oppositions" of the Rural Independent Competitive Alliance was served on this 2nd day of August 2001, via hand delivery or by first class, U.S. mail, postage prepaid to the following parties:


Ann Tait

Chairman Michael Powell *
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, DC 20554

Commissioner Michael J. Copps *
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, DC 20554

Commissioner Kathleen Abernathy *
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, DC 20554

Commissioner Gloria Tristani *
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, DC 20554

Commissioner Kevin Martin *
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, DC 20554

Teresa K. Gaugler, Asst. Gen. Counsel
Jonathan Askin, General Counsel
The Association for Local
Telecommunications Services
888 17th Street, NW, Suite 900
Washington, DC 20006

Mark C. Rosenblum
Peter H. Jacoby
AT&T CORP.
295 North Maple Avenue, Room
1134L2
Basking Ridge, NJ 07920

James F. Bendernagel, Jr.
C. John Buresh
Daniel Meron
Sidley Austin Brown & Wood
1722 Eye Street, NW
Washington, DC 20006
Attorneys for AT&T Corp.

Richard M. Rindler
Patrick J. Donovan
Michael P. Donahue
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007
Counsel for Focal Communications Corp and
US LEC Corp.

Richard J. Metzger
Focal Communications Corporation
7799 Leesburg Pike
Suite 850 North
Falls Church, Virginia 22043

Sumner N. Smith
US LEC Corp.
Three Morrocroft Centre
6801 Morrison Blvd
Charlotte, North Carolina 28211

Henry G. Hultquist
Worldcom, Inc.
1133 19th Street, NW
Washington, DC 20036

Richard J. Johnson
Michael J. Bradley
Moss & Barnett
4800 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Counsel for Minnesota CLEC Consortium

Margot Smiley Humphrey
Holland & Knight, LLP
2099 Pennsylvania Avenue, NW
Suite 100
Washington, DC 20006-6801
Counsel for TDS Metrocom, Inc.

H. Richard Juhnke
Sprint Corporation
401 9th Street, NW
Washington, DC 20004

Thomas Koutsy
Z-Tel Communications, Inc.
601 S. Harbour Island, Blvd., Suite 220
Tampa, FL 33602

Michael B. Hazzard
Tamara E. Connor
Kelley Drye & Warren LLP
8000 Towers Crescent Drive
Twelfth Floor
Vienna, Virginia 22182
Counsel for Z-Tel Communications, Inc.

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1424 Sixteenth Street, N.W.
Suite 105
Washington, DC 20006
Counsel for Association of Communications Enterprises

Thomas Jones
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
Counsel for Time Warner Telecom

James U. T
James H. Lister
Arter & Hadden LLP
1801 K Street, N.W.
Suite 400K
Washington, D.C. 20006-1301
Counsel for Iowa Telecommunications Services, Inc.

Kenneth K. Okel
Vice President, Regulatory Affairs
U.S. TelePacific Corp.
515 S. Flower Street, 47th Floor
Los Angeles, California 90071

Karen Brinkmann
Alexander D. Hoehn-Saric
Latham & Watkins
555 11th Street, N.W., Suite 1000
Washington, D.C. 20004
Counsel for U.S. TelePacific Corp.

Sharon J. Devine
Craig J. Brown
Quest Communications International, Inc.
1020 19th Street, N.W., Suite 700
Washington, D.C. 20036

Jane Jackson *
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-A225
Washington, DC 20554

Jeffrey Dygert *
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-A225
Washington, DC 20554

International Transcription Service *
1231 20th Street, NW
Washington, DC 20036

* Via hand delivery